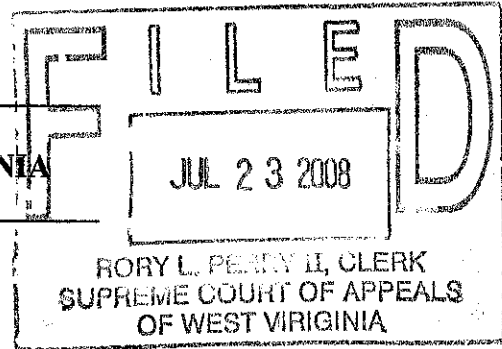


NO. 073790

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA



**RUSSELL STUYVESANT, Administrator
of the estate of TIMOTHY DAFT,**

Plaintiff Below - Appellant,

v.

**Circuit Court of Preston County
Civil Action No. 07-C-184**

THE PRESTON COUNTY COMMISSION,

Defendant Below - Appellee.

**RESPONSE OF DEFENDANT BELOW - APPELLEE, THE PRESTON COUNTY
COMMISSION, TO BRIEF OF APPELLANT**

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TABLE OF AUTHORITIES

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<i>Bradshaw v. Soulsby</i> , 210 W.Va. 682, 558 S.E.2d 681 (2001).....	3, 4

INTRODUCTORY STATEMENT

A summary judgment was awarded to the Respondents by the Circuit Court of Preston County, West Virginia, on the basis that Russell Stuyvesant, Administrator of the Estate of Timothy Daft untimely filed his Complaint pursuant to W.Va. Code §55-7-6 which sets forth a two year statute of limitations for wrongful death actions and that there was not a factual basis for allowing the extension of the statute of limitations.

STATEMENT OF THE FACTS

Petitioner and Respondent agree that the facts relied upon by the Circuit Court at issue in its ruling are largely undisputed. The decedent, Timothy Daft, was an inmate at the Preston County Jail. He was found hanging in a jail cell inside the Preston County Jail on August 3, 2005. Timothy Daft died on August 3, 2005 as a result of the hanging. On or about September 15, 2005, Virginia Daft received, by mail, an invoice from Mountaineer Family Care Center. The invoice was for treatment Timothy Daft received on August 2, 2005. Ms. Daft contacted Mountaineer Family Care Center regarding the invoice and was informed the charges on the invoice were for the removal of stitches from Timothy Daft. Timothy Daft had received the stitches a week earlier after falling in the shower at the Preston County Jail. Ms. Daft contacted the Sheriff and was informed that she was not responsible for paying that invoice and was asked to submit the invoice to the Sheriff so that payment could be issued to Mountaineer Family Care Center.

The Petitioner, Russell Stuyvesant, filed suit, as Administrator of the estate of Timothy Daft, in the above-referenced action on August 20, 2007. The Complaint alleged a wrongful death action, under *West Virginia Code, Chapter 55, Article 7* and other applicable provisions of West Virginia statutory and common law, as a result of the alleged conduct of employees of the Preston County Sheriff's Department. The Complaint further alleged that on or about August 3, 2005, Timothy Daft was found hanging in his jail cell at the Preston County Jail. As a result of the hanging, Mr. Daft died.

DISCUSSION OF LAW

Despite the fact that the hanging occurred on August 3, 2005, this action was not filed until August 20, 2007, more than two years following the incident. *West Virginia Code* § 55-7-6 requires an action for wrongful death to be filed within two years after the date of the death. This action was not filed within the mandatory time limitations. On the face of the Complaint itself, the action was not timely filed.

The Petitioner's Complaint states, "On August 3, 2005 Timothy Daft was found hanged in his jail cell." The Complaint does not allege anything regarding the invoice or injuries that Petitioner now claims. The Petitioner cites *Bradshaw v. Soulsby*, 210 W.Va. 682 (2001), in his brief to state that the discovery rule applies to wrongful death actions. The *Bradshaw* case deals with a widow who did not know the cause of her husband's death until a later autopsy was performed. The case at hand differs in that the Petitioner was aware on August 4, 2005 that Timothy Daft had died of a hanging in the Preston County Jail. Therefore, the Petitioner would have been aware of a potential wrongful death suit at that time. The later invoice has no causal connection to the death of the decedent. Even in the Petitioner's petition, he admits that he was told the invoice was for the removal of stitches. The removal of the stitches for a fall that happened a week earlier has no causal connection to the incident at issue. The fact is the decedent died of a hanging on August 3, 2005 and on August 4, 2005, the Petitioner was put on notice that a potential wrongful death action existed. The Petitioner's Complaint did not address this later invoice that is now at issue. Further, the *Bradshaw* case goes on to state,

“In a wrongful death action, under the discovery rule, the statute of limitation begins to run when the decedent's representative knows or by the exercise of reasonable diligence should know: (1) that the decedent has died, (2) that the death was the result of a wrongful act, neglect, or default, (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty, and (4) that the wrongful act, neglect or default of that person or entity has a causal relation to the decedent's death.”

Id.

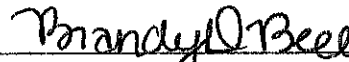
In the case at hand, the Complaint shows the Petitioner was aware, on August 3, 2005, that the decedent had died, that the death was a result of a hanging, that the decedent was housed at the Preston County Jail at the time of the hanging, and that the hanging resulted in the decedent's death. Petitioner does not claim the injuries suffered by Mr. Daft prior to the hanging relate in any way to his hanging or his death. There is no causal connection between the invoice for medical service to Timothy Daft and his hanging. Therefore, the Statute of Limitations begins to run on August 3, 2005.

Despite the fact that the hanging occurred on August 3, 2005, and the fact the Plaintiff had this knowledge regarding the decedent's death, this action was not filed until August 20, 2007, more than two years following the incident. *West Virginia Code* § 55-7-6 requires an action for wrongful death to be filed within two years after the date of the death. The Statute of Limitations would therefore not be tolled in the case at hand. Therefore, this action was not filed within the mandatory time limitations.

RELIEF PRAYED FOR

For the foregoing reasons the Respondent respectfully prays that the Petitioner's
Petition for Appeal be denied.

Respectfully submitted this 22nd day of July, 2008.




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CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of July, 2008, I served the foregoing **"Response of Defendant Below-Appellee, to Brief of Appellant"** upon the following, by depositing a true copy thereof in the United States mail, postage prepaid, in a sealed envelope addressed as follows:

S. Sean Murphy, Esquire
265 High Street, Suite 601
Morgantown, West Virginia 26505
Counsel for Plaintiff



Brandy D. Bell